

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 24, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP525-CRAC

Cir. Ct. No. 1996CF163

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LARRY L. GEORGE,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Brown County:
THOMAS J. WALSH, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Larry George appeals orders denying his motion for additional sentence credit or sentence modification based on new factors, and denying his motion for reconsideration. George contends: (1) his sentence at issue was made consecutive to a sentence that he was not serving at the time, and

therefore it should be treated as a concurrent sentence; and (2) the sentencing judge's comments show the court expected that George would be entitled to mandatory release after serving ten years in prison, which is inconsistent with the presumptive mandatory release law, and correcting that alleged error constitutes a new factor justifying a sentence reduction. We reject these arguments and affirm the orders.

¶2 In 1986 and 1987, George was sentenced in Winnebago County to sixteen years in prison. He was released on parole in 1995 and absconded in early 1996, during which time a warrant and criminal complaint were filed in Brown County charging George with sexual assault and false imprisonment. When George was apprehended in 1998, his parole was revoked and he was ordered reincarcerated for the remainder of his Winnebago County sentence, eight years and eighteen days. In September 2000, the Winnebago County Circuit Court reduced George's reincarceration to nineteen months. The State appealed that decision, and this court reversed the order and reinstated the eight years and eighteen days' reconfinement, subsequently reduced to seven years and seven days. *State ex rel. George v. Schwartz*, No. 2013AP969, unpublished slip op. (WI App Feb. 19, 2014). The parties agreed that the start date of the corrected sentence would be October 22, 2001.

¶3 In August 2001, George was convicted of sexual assault and false imprisonment in Brown County. The circuit court sentenced George to fifteen years for the sexual assault "consecutive to other sentence now serving," and a concurrent two years on the false imprisonment charge. George contends the imposition of the fifteen-year sentence before the October 22, 2001 start date for the Winnebago County reconfinement means the fifteen-year sentence was not consecutive to any sentence he was then serving, and should be treated as a

concurrent sentence entitling him to additional sentence credit. That argument was rejected in *State ex rel. George*, No. 2013AP969, unpublished slip op. ¶24:

George seeks to capitalize on the confusion resulting from time gaps and overlaps and the “concurrent to ... any other sentence imposed prior to 10/22/01” language in the January 15, 2010 order George argues that he was not serving any sentence at that point, so there was nothing for the Brown county sentence to be consecutive to, and, further, it was “prior to 10/22/01.” The nineteen-month reincarceration sentence was overturned on appeal, however, and the full eight-year, eighteen-day sentence was reinstated. That is the sentence the Brown county sentence is to be made consecutive to or concurrent with.

¶4 George’s persistent challenges to the sentence arise from two misunderstandings. First, he relies on statements made in the revocation order, the State’s briefs, and the Winnebago County court’s statements that his sentences were concurrent. The Winnebago County sentences may have been concurrent with one another, but it was for the Brown County court to determine whether its sentence would be consecutive or concurrent to the Winnebago County sentences. The Brown County court clearly imposed a consecutive sentence. Second, George appears to believe he was not serving his Winnebago County sentences while he was out of prison on parole. A defendant who is paroled is still serving a sentence. The term of confinement is not equivalent to the duration of his sentence. *State ex rel. Luedtke v. DOC*, 215 Wis.2d 1, 6-7, 572 N.W.2d 864 (Ct. App. 1997). Therefore, George did not begin serving the Brown County sentence until he completed the Winnebago County sentence in October 2005.

¶5 George contends the sentencing judge, Mark Warpinski, stated his intention was that George would be released on parole after ten years. George contends that statement shows Judge Warpinski was unaware that George would be subject to “presumptive mandatory release” rather than “mandatory release.”

The circuit court rejected George's claim, focusing on Judge Warpinski's comments at the sentencing hearing: "At no time did Judge Warpinski hypothesize as to how much time George would actually spend incarcerated based on when he thought George might be paroled." George committed his Brown County crimes in 1995, and was therefore subject to presumptive mandatory release rather than mandatory release.¹ Nothing in the sentencing transcript suggests Judge Warpinski was unaware of the difference at the time of sentencing.

¶6 George relies on Judge Warpinski's statements made during a 2010 hearing: "[A]nd if, in fact, Mr. George has served two-thirds of that sentence, he'd be entitled to mandatory release supervision." That statement does not establish that, when it imposed the sentence in 2001, the court was unaware of the law or intended to impose a sentence that would confine George for no more than ten years. Because George has not established the existence of a highly relevant fact unknown to the sentencing judge, he has not demonstrated a new factor warranting sentence modification. *See State v. Harbor*, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).

¹ A prisoner sentenced for a crime committed before December 31, 1999, is entitled to mandatory release after serving two-thirds of his or her sentence. *See* WIS. STAT. § 302.11(1) (2015-16). However, under § 302.11(1g)(am), a mandatory release date is only a presumptive mandatory release date for prisoners who committed a serious felony between April 21, 1994, and December 31, 1999. George committed his Brown County crimes on December 31, 1995. George was therefore subject to presumptive mandatory release rather than mandatory release.

